No. 03-498

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In The
Supreme Court of the United States

STEPHEN AMELKIN; DR. BRIAN CHRISTOPHER FEE; STUART LYON; NICHOLAS BAKER; DAVID KAPLAN; JAMES W. CHAMBERS; SIDNEY HANISH; RHODA DANIELS; THOMAS H. WATSON; KENNETH W. WALL; JAMES BOGARD,

Petitioners,

v.

ANN McCLURE, Document Custodian; GARY ROSE, Commissioner of Department of State Police; JUSTICE CABINET; DEPARTMENT OF STATE POLICE; and BEN CHANDLER, Attorney General for the Commonwealth of Kentucky,

AND

LOUISVILLE AND JEFFERSON COUNTY METROPOLITAN SEWER DISTRICT,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether, under the First Amendment, a state statute which makes traffic accident reports confidential, but allows a report to be provided to the parties to the accident or their representatives or insurers, or to a news-gathering organization for the purpose of reporting the news, is constitutional as applied to the Petitioners, attorneys and chiropractors who allege that they would use the information in the reports to direct advertising material to accident victims.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	5
I. THERE IS NO DIVISION AMONG THE CIRCUIT COURTS AS TO THE APPLICATION OR INTERPRETATION OF THIS COURT'S RECENT DECISION IN *UNITED REPORTING*	5
II. THE PETITIONERS' CHALLENGE TO KRS 189.635 IS GOVERNED BY THIS COURT'S REASONING IN *UNITED REPORTING*	6
III. THE PETITIONERS' ARGUMENTS MERELY AMOUNT TO AN ALLEGED MISAPPLICATION OF A PROPERLY STATED RULE OF LAW	9
IV. PETITIONERS' "AS-APPLIED" CHALLENGE TO KRS 189.635 TURNS ON THE PARTICULAR FACTS OF THIS CASE AND DOES NOT AFFECT PERSONS OTHER THAN THE PETITIONERS	10
V. PETITIONERS' ARGUMENTS CONCERNING JAMES BOGARD AND KRS 61.8745 WERE NOT PRESERVED IN THE LOWER COURTS AND MUST BE DISREGARDED	10
VI. THE PETITIONERS, EXCEPT POSSIBLY RHODA DANIELS, LACK STANDING TO CHALLENGE KRS 189.635 AS APPLIED	14
VII. PETITIONERS' CONSTITUTIONAL CHALLENGE TO KRS 61.874 IS NOT PROPERLY BEFORE THE COURT	15
CONCLUSION	16

TABLE OF AUTHORITIES

Page

CASES

Amelkin v. Commissioner, Dept. of State Police, 936 F.Supp. 428 (W.D.Ky. 1996) 2

Amelkin v. McClure, 178 F.Supp.2d 766 (W.D.Ky. 2001) 3

Amelkin v. McClure, 531 U.S. 871 (2000) 2, 13

Amelkin v. McClure ("Amelkin II"), 168 F.3d 893 (6th Cir. 1999) 2, 12

Amelkin v. McClure ("Amelkin III"), 205 F.3d 293 (6th Cir. 2000) 2, 13

Amelkin v. McClure ("Amelkin IV"), 330 F.3d 822 (6th Cir. 2003) ..... *passim*

Bowen v. Kendrick, 487 U.S. 589 (1988) 10

Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557 (1980) 5, 6, 9

City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988) 10

City of Springfield, Mass. v. Kibbe, 480 U.S. 257 (1987) 13

Los Angeles Police Dept. v. United Reporting Publishing Corp., 528 U.S. 32 (1999) ..... *passim*

McClure v. Amelkin, 528 U.S. 1059 (1999) 2, 5

New York v. Ferber, 458 U.S. 747 (1982) 10

STATUTES AND RULES

Fed. R. Civ. P. 25(d)(1) 1

Ky. Rev. Stat. § 189.635 ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Ky. Rev. Stat. § 61.874 ..... 1, 2, 3, 4, 15

Ky. Rev. Stat. § 61.8745 ..... 4, 14

STATEMENT OF THE CASE

This case has had a tortured and convoluted procedural history. The action was originally brought by the Petitioners in 1994 against Ann McClure as custodian of records for a local post of the Kentucky Department of State Police. The Petitioners sought a determination that the 1994 amendments to Kentucky Revised Statutes ("KRS") § 189.635 (establishing confidentiality of accident reports) were unconstitutional as an infringement on their freedom of commercial speech, and further sought an injunction against the enforcement of the amended statute. Jerry Lovitt, then Commissioner of the Kentucky State Police, was later made a Defendant in his official capacity, as was his successor, Gary Rose. Ann McClure was eventually dismissed as a Defendant. On March 27, 2000, Lovitt and Rose were dismissed as Defendants and Robert F. Stephens, Acting Commissioner, was made a Defendant. Stephens is now deceased; pursuant to FRCP 25(d)(1), the current Commissioner, Patrick N. Simpson, is automatically substituted as Respondent herein.

After initially obtaining a preliminary injunction against enforcement of the amendments to KRS 189.635 (later dissolved by order of the Sixth Circuit), the Petitioners filed a parallel civil action in the Western District of Kentucky naming as a class Defendant all city and county governments that maintained accident reports. That civil action was eventually consolidated into the instant case.

On April 3, 1996, the Petitioners filed a Second Amended Complaint which added a claim that KRS 61.874, as amended in 1994 (permitting agencies to charge additional fees for copies of public records when requested for commercial purposes), was unconstitutional, both on

its face and as applied to Petitioners by Gary Rose. Specifically, the Petitioners alleged that Rose had imposed an arbitrarily high fee for records requested for commercial purposes as opposed to records requested for non-commercial purposes.

On June 4, 1996, the District Court entered a preliminary and permanent injunction enjoining enforcement of KRS 189.635(5)-(6) and KRS 61.874 on the basis of facial unconstitutionality. *Amelkin v. Commissioner, Dept. of State Police,* 936 F.Supp. 428 (W.D.Ky. 1996). The Sixth Circuit reversed in part, apparently indicating that there was no facial invalidity to KRS 61.874, but remanding for specific findings as to the Petitioners' claim that the statute was unconstitutionally applied through the imposition of excessive copying fees. (Pet. at 33a; *Amelkin v. McClure ("Amelkin II"),* 168 F.3d 893 (6th Cir. 1999).)

This Court granted certiorari and vacated the Sixth Circuit's 1999 opinion, remanding the case for reconsideration in light of *Los Angeles Police Dept. v. United Reporting Publishing Corp.,* 528 U.S. 32 (1999). (Pet. at 32a; *McClure v. Amelkin,* 528 U.S. 1059 (1999).) On reconsideration, the Sixth Circuit reversed the District Court's holding that KRS 189.635(5)-(6) was invalid on its face, in light of the *United Reporting* case. The Sixth Circuit remanded the case to the District Court for consideration of Petitioners' "as-applied" challenge to KRS 189.635, as well as their "as-applied" challenge to KRS 61.874. (Pet. at 25a; *Amelkin v. McClure ("Amelkin III"),* 205 F.3d 293 (6th Cir. 2000).) This Court denied certiorari on October 2, 2000. (Pet. at 24a; *Amelkin v. McClure,* 531 U.S. 871 (2000).) **At that point, the Petitioners' facial challenges to KRS 189.635 were finished.**

The District Court, on motion, dissolved all injunctions on June 11, 2001. The Petitioners then proceeded to present their case to the District Court on their challenge to KRS 189.635 and KRS 61.874 as applied.

The case was submitted on cross-motions for summary judgment. The District Court found that the Petitioners had alleged no facts to distinguish the application of KRS 189.635 in this case from its facial terms as written. (Pet. at 22a; *Amelkin v. McClure,* 178 F.Supp.2d 766, 771 (W.D.Ky. 2001).) Accordingly, the District Court followed the reasoning of *United Reporting* and the Sixth Circuit's analysis of KRS 189.635, and concluded from the record that the statute was not unconstitutional as applied to the Petitioners. (Pet. at 22a; *Amelkin,* 178 F.Supp.2d at 771.) Since KRS 189.635 was constitutional as applied, the accident reports sought by the Petitioners for commercial purposes were confidential, and the District Court therefore found the Petitioners' claim of excessive copying fees under KRS 61.874 to be moot. (Pet. at 23a; *Amelkin,* 178 F.Supp.2d at 771.) The Respondents' summary judgment motion was granted, and the Petitioners' motion was denied. (*Id.*)

On appeal, the Sixth Circuit analyzed KRS 189.635 as applied to Petitioners, in light of this Court's reasoning in *Los Angeles Police Dept. v. United Reporting Publishing Corp.,* 528 U.S. 32 (1999), and concluded that the statute was constitutional. The panel found that the statute neither restricted the Petitioners' right to engage in commercial speech, nor discriminated against the Petitioners based on their intent to engage in commercial speech, but merely limited access to government information (accident reports) to news-gathering organizations and those individuals with a personal interest in the

accident. (Pet. at 11a; *Amelkin v. McClure ("Amelkin IV")*, 330 F.3d 822, 828 (6th Cir. 2003).) The Sixth Circuit further found that KRS 189.635 did not offend equal protection, since the protection of accident victims' privacy afforded a rational basis for the distinctions drawn in the statute. (Pet. at 12a; *Amelkin IV,* 330 F.3d at 829.) Finally, the Sixth Circuit agreed with the District Court that Petitioners' "as-applied" challenge to KRS 61.874 was moot. (Pet. at 13a; *Amelkin IV,* 330 F.3d at 829.) The decision of the District Court was affirmed.

Respondents wish to bring a significant misstatement in the Petition to the Court's attention, inasmuch as it is relevant to a Statement of the Case. In their own Statement of the Case, the Petitioners allege that the Sixth Circuit erred when it "apparently did not recall" or "failed to recognize" two arguments that the Petitioners in fact *failed to make*: (1) that Petitioner James Bogard was a "news-gathering organization" for purposes of KRS 189.635(6); and (2) that the Petitioners' commercial speech was restricted or burdened by KRS 61.8745, which authorizes payment of damages to a public agency for certain unauthorized uses of public records. (Pet. at 16-17.) Neither of these arguments was preserved in the District Court or the Court of Appeals below, and accordingly neither can be alleged as a point of error.

REASONS FOR DENYING THE WRIT

I. THERE IS NO DIVISION AMONG THE CIRCUIT COURTS AS TO THE APPLICATION OR INTERPRETATION OF THIS COURT'S RECENT DECISION IN *UNITED REPORTING*.

This Court previously remanded this case to the Sixth Circuit to be reconsidered in light of the decision in *Los Angeles Police Dept. v. United Reporting Publishing Corp.*, 528 U.S. 32 (1999). (Pet. at 32a; *McClure v. Amelkin*, 528 U.S. 1059 (1999).) The *United Reporting* case substantially altered the landscape of First Amendment law in cases dealing with access to government records.

This Court held in *United Reporting* that a state statute which merely regulates access to government information does not on its face abridge freedom of speech. *United Reporting*, 528 U.S. at 40. The Sixth Circuit, in considering the Petitioners' "as-applied" challenge, properly noted that "Section 189.635, insofar as it applies to the [Petitioners], does not restrict or even regulate expression. Rather, it simply restricts *access* to confidential information possessed by the government." (Pet. at 8a; *Amelkin IV*, 330 F.3d at 827 (emphasis in original).) Therefore, the analysis of KRS 189.635 as applied to the Petitioners reached the same result as the analysis of the statute on its face under *United Reporting*. No restriction or regulation of the Petitioners' expression was involved, and the test enunciated in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), was therefore inapplicable. (Pet. at 8a; *Amelkin IV*, 330 F.3d at 827.)

The Petitioners do not cite any decisions of other Circuit Courts implementing *United Reporting*, but simply

recount the state of the law in the circuits as it existed prior to *United Reporting.* This is no longer an accurate portrayal of the applicable law, since this Court has now made clear that the *Central Hudson* analysis only applies when the parties' freedom of speech is restricted by the statute in question. Respondents submit that there is no division among the circuits as to the application of *United Reporting* or its reasoning, since no case law has yet been developed in the various circuits applying the decision in the context of "as-applied" constitutional challenges. It would therefore be inopportune for the Court to grant the petition so soon after *United Reporting,* before the lower courts have had an opportunity to reach either a consensus or a disagreement as to its interpretation.

II. THE PETITIONERS' CHALLENGE TO KRS 189.635 IS GOVERNED BY THIS COURT'S REASONING IN *UNITED REPORTING.*

The Sixth Circuit correctly followed this Court's reasoning in *United Reporting, supra,* and reached its holding on the basis of the analysis embodied in that decision. The court first noted that the Petitioners could not rely upon a potentially invalid application of KRS 189.635 to news-gathering organizations, since the statute on its face did not restrict speech and therefore was not subject to an "overbreadth" challenge based on the rights of others. (Pet. at 7a; *Amelkin IV,* 330 F.3d at 826 (citing *United Reporting,* 528 U.S. at 40).) The court then rejected Petitioners' contention that *Central Hudson, supra,* applied, in view of the fact that the statute placed restrictions only on their access to information, not upon their speech. (Pet. at 8a; *Amelkin IV,* 330 F.3d at 827.) This

parallels the analysis used by this Court in *United Reporting*, 528 U.S. at 40.

KRS 189.635 does not place any restrictions on the speech of the Petitioners, but merely controls access to government information. This is precisely the reason the California statute in *United Reporting* was held valid on its face: "This is not a case in which the government is prohibiting a speaker from conveying information that the speaker already possesses. . . . [W]hat we have before us is nothing more than a governmental denial of access to information in its possession." *United Reporting*, 528 U.S. at 40. Similarly, KRS 189.635 merely limits access to information. If that information should be made public by the news media, the statute does not thereafter restrict its use by the Petitioners in any way. *Cf. United Reporting*, 528 U.S. at 42-43 (Ginsburg, J., concurring).

The Sixth Circuit observed that all the separate opinions in the *United Reporting* case agreed that a state could decide not to give out certain information at all and not violate the First Amendment. (Pet. at 9a; *Amelkin IV*, 330 F.3d at 827 (citing *United Reporting*, 528 U.S. at 40).) The panel noted, however, that a majority of this Court's membership also asserted that a state could not decide to engage in political viewpoint discrimination when deciding who should receive information. (Pet. at 9a; *Amelkin IV*, 330 F.3d at 827-28 (citing *United Reporting*, 528 U.S. at 43 (Ginsburg, J., concurring), 46 (Stevens, J., dissenting)).) Analyzing the classifications in KRS 189.635 under the "unconstitutional-conditions" doctrine, the Sixth Circuit concluded that the statute did not "specifically disfavor discrete groups on content-related grounds," but merely granted access to accident reports to "news-gathering organizations and those individuals with a personal

interest in the accident." (Pet. at 11a; *Amelkin IV,* 330 F.3d at 828.) Therefore, there was no discrimination against the Petitioners based on their intent to engage in commercial speech.

This parallels the reasoning of the concurring and dissenting opinions in *United Reporting,* and makes clear that if there is any material difference between Kentucky's statute (as applied to the Petitioners) and the California statute analyzed in *United Reporting,* it is that KRS 189.635 is *less* burdensome on commercial speech. The statute at issue in *United Reporting* named a multitude of purposes for which access to arrest records was to be granted, including "a scholarly, journalistic, political, or governmental purpose, or ... for investigation purposes by a licensed private investigator." *United Reporting,* 528 U.S. at 35 (quoting Cal. Govt. Code § 6254(f)(3)). This arguably had the effect of "den[ying] access to a small disfavored class." *Id.* at 45 (Stevens, J., dissenting).

By contrast, KRS 189.635 makes accident report information confidential except for its release "on a selective basis to a limited group of users who have a special, and legitimate, need for the information." *Id.* (Stevens, J., dissenting). This limited group includes only the parties to the accident and their guardians, attorneys, and insurers; as well as news-gathering organizations reporting the news. Since Kentucky's statute imposes less of an arguable burden on commercial speech than does California's – even under the theory unsuccessfully urged by the dissent in *United Reporting* – this Court's analysis in that case is clearly dispositive of the Petitioners' First Amendment challenge to KRS 189.635 as applied to them.

Accordingly, the applicable standard was not the stringent multi-prong test of *Central Hudson, supra,* but the "rational-basis" analysis under the Equal Protection Clause. The Sixth Circuit properly found this standard was satisfied by the fact that "Kentucky's legislature might well have concluded that the occasional publication of information contained in an accident report because of its newsworthy nature is less invasive to the overall class of accident victims than the myriad other uses to which such reports could be put." (Pet. at 12a; *Amelkin IV,* 330 F.3d at 829.) The Petition is therefore without merit and the writ should be denied.

III. THE PETITIONERS' ARGUMENTS MERELY AMOUNT TO AN ALLEGED MISAPPLICATION OF A PROPERLY STATED RULE OF LAW.

The Petition does not allege an incorrectly stated rule of law, but only a misapplication of a properly stated rule of law. Petitioners do not dispute that a statute which merely regulates access to information, and does not discriminate based on the content of a requester's speech, is constitutional. *Cf. United Reporting, supra.* They merely allege that the Sixth Circuit improperly found that KRS 189.635 as applied, under the facts presented, did not restrict their speech or discriminate against them based on their commercial speech. (Pet. at 21-27.) Accordingly, the issuance of a writ is not warranted in this case.

IV. PETITIONERS' "AS-APPLIED" CHALLENGE TO KRS 189.635 TURNS ON THE PARTICULAR FACTS OF THIS CASE AND DOES NOT AFFECT PERSONS OTHER THAN THE PETITIONERS.

Part of the nature of the argument that a statute is "unconstitutional as applied" is the limitation of a case's application to its own facts and to the parties involved. When a statute is challenged "as applied," and is found to be facially valid, the District Court considers "the evidence presented . . . insofar as it sheds light on the manner in which the statute is presently being administered." *Bowen v. Kendrick,* 487 U.S. 589, 621 (1988). In particular, an "as-applied" challenge requires "focusing on the factual situation before us." *New York v. Ferber,* 458 U.S. 747, 768 (1982). *See also City of Lakewood v. Plain Dealer Publishing Co.,* 486 U.S. 750, 758-59 (1988) (referring to "case-by-case nature of 'as applied' challenges").

If Petitioners argue that KRS 189.635, though valid on its face, is being administered so as to affect them in an unconstitutional manner, such an argument turns solely on the particular facts of this case and affects only the parties to this case. As such, this case does not merit review by this Court, since it does not have far-reaching effects as to the constitutionality of KRS 189.635 or other similar statutes.

V. PETITIONERS' ARGUMENTS CONCERNING JAMES BOGARD AND KRS 61.8745 WERE NOT PRESERVED IN THE LOWER COURTS AND MUST BE DISREGARDED.

For the first time in presenting their challenge to KRS 189.635 as applied, the Petitioners now advance the

argument that Petitioner James Bogard is a "news-gathering organization" within the definition of KRS 189.635(6), and that he is thus uniquely affected by the statute in a way that the other Petitioners are not. This argument cannot be heard on a petition for certiorari, since it has not been preserved for review.

In 2000, after the Sixth Circuit found KRS 189.635 facially constitutional and remanded this case for consideration of Petitioners' "as-applied" challenge, the District Court reassigned the case to Chief Judge John Heyburn due to the intervening death of District Judge Charles Allen. Judge Heyburn afforded the parties an opportunity to take discovery and present cross-motions for summary judgment on the "as-applied" challenge. At no point in their memorandum to the District Court did the Petitioners argue that James Bogard was a "news-gathering organization" or was differently affected by KRS 189.635 from the other Petitioners. On the contrary, the only reference to Bogard was a background recitation that he supplied accident information to lawyers via a newsletter and believed the statute "similarly infringed his First Amendment rights" (*i.e.,* similarly to how it affected the other Petitioners).

The Petitioners neither made the argument nor presented any evidence to the District Court that James Bogard was a "news-gathering organization," nor did they attempt to analyze his claim separately or differently from those of the other Petitioners. Judge Heyburn was never asked to rule on whether Bogard was a "news-gathering organization," or on whether KRS 189.635, as applied, abridged his freedom of speech any differently from the attorneys and chiropractors. The issue was waived.

Likewise, the argument Petitioners now raise as to James Bogard was not raised in the Circuit Court as a point of error on appeal. In their briefs before the Sixth Circuit, Petitioners never mentioned James Bogard at all. Rather, they consistently identified themselves as "attorneys and chiropractors" (or, in one instance, as "primarily attorneys and chiropractors"). The Sixth Circuit panel never heard Petitioners' argument that Bogard was a "news-gathering organization," or that KRS 189.635 as applied abridged Bogard's freedom of speech differently from its effect on the other Petitioners. Again, the issue was waived.

The Petitioners now claim that the Sixth Circuit "apparently did not recall . . . who the parties to the case were." (Pet. at 16.) In fact, it was the Petitioners who apparently forgot to make the argument they now belatedly attempt to introduce. At no time in the "as-applied" phase of this litigation did the Petitioners ever argue that James Bogard's claims should be separately analyzed under the "news-gathering organization" provision in KRS 189.635(6). No such argument was presented to the district judge or Sixth Circuit panel that considered their "as-applied" challenge.

In fact (contrary to the Petitioners' claim), even the Sixth Circuit's 1999 opinion (Pet. at 41a-42a; *Amelkin II,* 168 F.3d at 897) does not reflect a finding, or even an argument, that James Bogard was a "news-gathering organization." Rather, the court at that time was entertaining a facial overbreadth challenge to KRS 189.635, and struck it down based on a provision that did not apply to the Petitioners. The Sixth Circuit made it clear in 2003 (Pet. at 7a; *Amelkin IV,* 330 F.3d at 826) that the 1999

panel was addressing non-parties when it spoke of "news-gathering organizations":

> In asserting their own rights, however, the [Petitioners] cannot prevail on the theory that § 189.635 curtails the rights of ***other parties not before the court***. *Amelkin II* failed to recognize this point, and instead improperly focused on the restrictions that the statute placed upon news-gathering organizations ***rather than upon the [Petitioners].***

(Citation omitted; emphasis added.) At no time during the facial overbreadth litigation, then, was there a finding that James Bogard was a "news-gathering organization," and at no time during the "as-applied" litigation did Petitioners even attempt to assert that he was.

The law is well established that a new argument cannot be advanced on review that was not preserved in the proceedings below. *City of Springfield, Mass. v. Kibbe,* 480 U.S. 257, 259 (1987). Accordingly, James Bogard's claim must be analyzed no differently from those of the other Petitioners, just as it was treated in the courts below with Petitioners' evident approval. Only the application of KRS 189.635 to the Petitioners is at issue, and under the law of the case, *Amelkin III, supra; Amelkin, supra,* 531 U.S. 871 (Pet. at 24a), the Petitioners can make no overbreadth facial challenges to the statute based on its potential application to news-gathering organizations or other non-parties.

Also, the Petitioners now argue for the first time that *if* they obtained an accident report lawfully, they might theoretically be penalized for commercial speech thereafter by having to pay damages to a public agency

(characterized by Petitioners as "fines") under KRS 61.8745. This argument was neither presented to the District Court nor mentioned in Petitioners' briefs before the Sixth Circuit. Petitioners disingenuously claim that the Sixth Circuit "failed to recognize" the effect of KRS 61.8745, when in fact it was the Petitioners who failed to mention it below. Unpreserved arguments cannot be advanced for the first time in a petition for certiorari, and accordingly Petitioners' arguments concerning KRS 61.8745, not having been preserved below, should not be entertained by this Court.

VI. THE PETITIONERS, EXCEPT POSSIBLY RHODA DANIELS, LACK STANDING TO CHALLENGE KRS 189.635 AS APPLIED.

In support of their summary judgment motion in the District Court, the Petitioners' only evidence that KRS 189.635 had been applied to them was certain unauthenticated correspondence between Petitioner Rhoda Daniels and the Kentucky State Police purporting to show that Ms. Daniels requested copies of some accident reports and the request was denied pursuant to KRS 189.635. Assuming *arguendo* that the correspondence is authentic, there is *no* evidence in the record that any of the other Petitioners requested copies of accident reports and were denied them under KRS 189.635. Accordingly, the Petitioners other than Rhoda Daniels do not have standing to challenge KRS 189.635 "as applied," since the statute was never in fact applied to them.

VII. PETITIONERS' CONSTITUTIONAL CHALLENGE TO KRS 61.874 IS NOT PROPERLY BEFORE THE COURT.

The Sixth Circuit, affirming the District Court, correctly held that Petitioners' constitutional challenge to KRS 61.874 (dealing with fees for obtaining public records) was moot in light of the fact that the Petitioners were not entitled to obtain accident reports under KRS 189.635. The District and Circuit Courts therefore have not made any findings as to the constitutionality of KRS 61.874. As the Sixth Circuit correctly noted, this would be a matter for the District Court to reach only if KRS 189.635 had been found unconstitutional as applied to the petitioners. (Pet. at 13a; *Amelkin IV,* 330 F.3d at 829.) The only issue that is ripe for review is whether the challenge to KRS 61.874 was properly dismissed as moot in light of the constitutionality of KRS 189.635. Since Petitioners are not entitled to obtain the documents, pursuant to a constitutionally valid statute, the issue of fees is necessarily moot, and the Sixth Circuit properly so held.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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